



THE SUPREME COURT *of* OHIO

Overview *of the* Grand Jury System

Task Force
*to Examine Improvements
to the Ohio Grand Jury System*



TABLE OF CONTENTS

The History of the Grand Jury	1
The Current Function and Capability of the Grand Jury in America and Ohio.....	5
Grand Jury Statistics	13
Survey of Other States' Use of the Grand Jury.....	15



THE HISTORY OF THE GRAND JURY

Origination in England

The grand jury was first recognized as an institution in 12th century England by King Henry II.¹ The installation of the grand jury under King Henry has been called a power grab of sorts. By requiring the grand jury to initiate all criminal prosecutions, the crown held authority that otherwise would belong to the church or barons.

Furthermore, King Henry's grand jury did not truly serve as the protective shield for an accused's rights. More than anything, the grand jury was a political weapon used against enemies of the crown.² It wasn't until the mid-1600s that the grand jury began to emerge as a protective barrier against an accused defendant and an overbearing government.

In 1681, the British crown pursued an indictment against the Earl of Shaftesbury for allegedly making treasonous statements. Despite strong government influence and pressure, the grand jury refused to return an indictment.³ It was this defiance of the crown that first revealed the grand jury as a shield for the accused.⁴

Colonial America

As England journeyed to the American colonies, so too did the grand jury. Each American colony instituted its own version of the grand jury, with variations found in how grand jurors were selected or appointed.⁵ Outside of criminal prosecutions, colonial-era grand juries were used for a variety of functions. They levied taxes, appointed public officials, and supervised public works.⁶ Certain colonies even allowed grand juries to audit public institutions and inspect jails.⁷

In the buildup to the American Revolution, grand juries became a tool for "outright resistance to the monarchy."⁸ Despite British officials accusing newspaper publisher John Peter Zenger of printing libelous statements about the crown, a colonial grand jury refused to indict him – three times.⁹ After gaining independence from the British, Americans adhered to the idea that

¹ 1 BEALE, SARA, ET AL., GRAND JURY LAW & PRACTICE, § 1:2 (2d ed. 2002)

² Ric Simmons, *Article: Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U.L. REV. 1, 6 (2002)

³ *Id.* at 9 (citing Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 715 (1972)). The government later questioned the foreperson for the grand jury as to why no indictment was issued and ultimately imprisoned him in the Tower of London. BEALE at §1:2, 1-10.

⁴ Mark Kadish, *Article: Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U.L. REV. 1, 9 (1996).

⁵ BEALE at §1:3, 1-13.

⁶ Kadish at 10.

⁷ BEALE at §1:3, 1-13.

⁸ Kadish at 10.

⁹ *Id.* at 12. Zenger was ultimately prosecuted by a bill of information, which only emboldened the American preference for grand juries.

the grand jury could act as a great defender of liberty. In 1791, the Fifth Amendment to the U.S. Constitution was adopted and, with it, the right to a grand jury was created.

Continued Use Across the Country

After its inclusion in the Constitution, the right to a grand jury was uniformly provided by individual states as well.¹⁰ By the mid-1800s, however, this consensus was quickly eroding. Contending that the grand jury had outlived its purpose and that its investigatory powers were infringing on personal liberties, multiple states removed the right to a grand jury from their constitutions.¹¹

Around this same time, six newly admitted states declined to utilize the grand jury. Mostly western and sparsely populated, these states contended that the grand jury was too cumbersome and inefficient for their needs.¹²

In the 1970s, another push for grand jury reform emerged but at the federal level. Following the Watergate scandal, there was concern over the Department of Justice using the grand jury system to harass opponents of the current administration.¹³ This concern led to the Grand Jury Reform Act of 1976, which proposed several procedural changes to the federal grand jury but died in Congress. During this era, multiple states either greatly weakened or eliminated the right to a grand jury.¹⁴

Over time, the role of the American grand jury has been diluted. In roughly half of all states, an indictment is not needed to bring a criminal charge.¹⁵ In most of those states, criminal charges are initiated through a preliminary hearing before a judge.

History in Ohio

In 1802, Ohio included the right to a grand jury in its first constitution.¹⁶ In 1851, Ohio revamped its constitution but retained the right to a grand jury.¹⁷ In 1953, the General Assembly enacted a series of statutes that established a basic framework for how the grand jury should

¹⁰ BEALE at §1:4.

¹¹ *Id.* at §1-5, 1-21. Michigan, Indiana, Kansas, and Oregon all did away with the constitutional right to a grand jury, but allowed it to exist should the legislature enact it.

¹² *Id.* These states were those admitted to the Union in 1889: Idaho, Montana, Washington, North Dakota, South Dakota, and Wyoming.

¹³ Gregory T. Fouts, *Reading the Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 IND. L.J. 323, 340 (2004).

¹⁴ BEALE at §1:5, 1-27. These states include Maryland, Hawaii, Illinois, and Pennsylvania.

¹⁵ *Id.* at §1-7, 1-32. A more thorough account of which states use grand juries can be found in “Survey of Other States’ Use of the Grand Jury,” included with these materials.

¹⁶ BEALE at §1:4, 1-20; Ohio Const. of 1802, Art. VII, §10.

¹⁷ Ohio Const., Art. I, §10.

operate.¹⁸ These statutes set forth how jurors should be selected, how many votes would be required to issue an indictment, and how a witness may be held in contempt for refusing to testify.

In 1973, the Supreme Court of Ohio implemented Ohio Criminal Rule 6. This rule set forth the procedure for challenging the legal qualifications of particular grand jurors or of the panel as a whole and allowed for the dismissal of an indictment in the event that jurors are not selected in accordance with the law. Ohio Crim. R. 6 also required secrecy for grand jury proceedings.

Ohio Crim. R. 6 also requires that a grand jury consist of nine members, and that seven must vote in favor of an indictment for one to issue. Eleven years later – in 1984 – the General Assembly passed a bill that required grand juries to have 15 members, with 12 votes needed to secure an indictment. The Supreme Court of Ohio has ruled that the “7 of 9” standard in Crim. R. 6 applies because the number of votes needed to indict is a procedural issue, and thus under the purview of the Supreme Court’s rules.¹⁹

Outside of some minor tweaks to modernize the selection of grand jurors from the countywide jury pool, the grand jury in Ohio has remained essentially unchanged.

A more thorough look at how different states use grand juries and why they do so can be found in “Survey of Other States’ Use of the Grand Jury,” included in this packet.

¹⁸ R.C. 2939.01, et seq.

¹⁹ *State v. Brown*, 38 Ohio St. 3d 305, 528 N.E.2d 523 (1988).



THE CURRENT FUNCTION AND CAPABILITY OF THE GRAND JURY IN AMERICA AND OHIO

Federal System

Under the Fifth Amendment of the U.S. Constitution, a citizen accused of a “capital, or otherwise infamous crime” has the right for that case to be brought before a grand jury. The overriding purpose of this requirement was to shield citizens from overzealous prosecution.¹ Over the years, the breadth of this protection has been fleshed out by the U.S. Supreme Court, the Federal Rules of Criminal Procedure, and various pieces of legislation.

For instance, the U.S. Supreme Court has held that multiple constitutional protections that apply to criminal defendants do not apply at the grand jury stage.² It has also limited a court’s power to shape how the grand jury functions and what types of evidence are required for an indictment.³

In 1945, Rule 6(e) of the Federal Rules Criminal Procedure first codified the requirement that grand jury proceedings be secret.⁴ The secrecy of grand jury proceedings has also been affected by the Jencks Act, the Right to Financial Privacy Act, the Freedom of Information Act, and other statutes.⁵ Rule 6 also sets forth that a grand jury must have 16 to 23 members, and that an indictment requires votes from at least 12 of those members.

Though the federal grand jury system has been a constitutional right since the nation’s birth, individual states have never been required to provide a grand jury in their own criminal justice systems as a matter of federal constitutional law.⁶ Because states are quasi sovereign, they are free to define the use of grand juries by state constitution or state law. Accordingly, states are left entirely on their own to either craft their own version of a grand jury or to use a system other than the grand jury.⁷

Ohio System

Ohio has opted to include an accused’s right to a grand jury in its state constitution, and particular the state Bill of Rights.⁸ The grand jury language used in Ohio is almost identical to that used in the U.S. Constitution. Also like the federal model, Ohio requires secrecy in its grand

¹ For a more detailed discussion of the grand jury’s history and purpose, refer to “The History of the Grand Jury,” included in this packet.

² *United States v. Williams*, 504 U.S. 36, 49, 112 S. Ct. 1735, 1743 (1992) (restating various holdings that limit constitutional protections during a grand jury proceeding, including the right to counsel and protection against double jeopardy).

³ *Id.* at 52 (holding that an appellate court cannot prescribe standards of prosecutorial conduct before a grand jury by requiring that any exculpatory evidence be presented).

⁴ 1 BEALE, SARA, ET AL., GRAND JURY LAW & PRACTICE, § 5:2, 5-9 (2d ed. 2002) (over the years, this rule has been amended multiple times).

⁵ *Id.* at §5:3, 5-10.

⁶ *Hurtado v. California*, 110 U.S. 516 (1884).

⁷ A more thorough examination of what other states have done can be found in “Survey of Other States’ Use of the Grand Jury,” included in this packet.

⁸ Ohio Const., Art. I, §10.

jury proceedings through Ohio Crim. R. 6(E). The secrecy requirement is mentioned in the grand juror's oath and again in the charge given to the grand jury.⁹

One difference between Ohio and the federal system is the number of jurors required. In Ohio, a grand jury consists of nine members and seven votes are needed to secure an indictment.¹⁰

Ohio's mirroring of the federal model is helpful because any federal case law, while not binding, would be persuasive and instructive in any constitutional analysis of Ohio's grand jury system. For that reason, the federal case law can supplement the material used to show what the Ohio grand jury – under the law – must be, can be, and should be.

What an Ohio Grand Jury Must Be – The Constitutional Floor

When assessing what traits a grand jury is required have under the Ohio Constitution, the answer is simple: Not many. As the U.S. Supreme Court wrote: “An indictment returned by a legally constituted and unbiased grand jury, [...] if valid on its face, is enough to call for trial of the charge on the merits. *The Fifth Amendment requires nothing more.*”¹¹ The Constitution also requires that a grand jury's decision be “informed and independent.”¹²

In order to find that a grand jury's independence and integrity has been compromised, a party typically must show prosecutorial misconduct of an egregious nature that “substantially influenced the grand jury's decision to indict.”¹³ In *United States v. Sigma Int'l.*, an assistant U.S. Attorney urged a grand jury to indict the defendant on a rushed time table, made questionable characterizations of evidence and procedure, and even falsely intimated that a previous grand jury wanted to indict the defendant but could not because its term ended. For those reasons, the Eleventh Circuit ordered that the indictment be dismissed.

In contrast, the exclusive use of hearsay evidence does not rise to the level of supplanting the grand jury's independence.¹⁴ Similarly, a grand jury may remain independent in a murder case even though its foreman is a casual acquaintance with the deceased victim.¹⁵

⁹ R.C. 2939.06; R.C. 2939.07.

¹⁰ Ohio Crim. R. 6(A) and (F). As discussed in “The History of the Grand Jury,” Ohio has statutes that require a different number of grand jurors. The Supreme Court of Ohio, however, has ruled that the number of grand jurors is a procedural issue, meaning Crim. R. 6 overrules these statutes.

¹¹ *Costello v. United States*, 350 U.S. 359, 363 (1956) (emphasis added) A grand jury's required level of due process has also been described as “an informed and independent determination.”

¹² *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1391, (9th Cir. Cal. 1983) (citing *Stirone v. United States*, 361 U.S. 212, 218-19 (1960)).

¹³ *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256, (1988); see also *United States v. Sigma Int'l*, 244 F.3d 841, Note 41 (11th Cir. 2001) (“[W]here a grand jury is so overborne by a prosecutor's or judge's influence that the indictment that issues cannot meaningfully be called ‘of a Grand Jury,’ U.S. Const. amend. V, the indictment must be dismissed.”)

¹⁴ *Costello*, 250 U.S. at 361.

¹⁵ *State v. Thomas*, 3rd Dist. Case No. 8-91-18, 80 Ohio App. 3d 452, 457

Under the language in the U.S. and Ohio Constitutions, the grand jury has typically been given a great deal of freedom to “pursue its investigations unhindered by external influence or supervision” from a court.¹⁶ While a grand jury is mostly free from a court’s inherent power to supervise, that does not mean it is able to ignore all statutes or rules.¹⁷

What an Ohio Grand Jury Can Be – Drafting the “Few, Clear Rules”

The U.S. Supreme Court wrote that the grand jury and prosecutors presenting before it are given “wide latitude,” but both entities are still “bound by a few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury’s functions.”¹⁸ Both the U.S. Congress and the Ohio General Assembly have enacted certain statutes that effect how a grand jury functions. Similarly, Ohio Crim. R. 6 and Fed. R. Crim. Pro. 6 provide standards for a grand jury. This section will explore various topics related to the operation of a grand jury and the guidelines that can be enacted to control them.

- Presenting Cases Following a No-Bill

The grand jury language in the U.S. and Ohio Constitutions does not create double jeopardy protection at the grand jury level. In other words, a prosecutor may present a case to a grand jury multiple times, even if prior juries decline to indict the accused.¹⁹ While the constitutional language does not bar multiple presentations of a case, several states have done so by statute. Fifteen states have statutes or court rules that prohibit presenting a case to the grand jury more than once.²⁰ Thirteen of these states have a constitutional requirement for a grand jury that is similar to Ohio’s.

Proponents of allowing multiple presentations to a grand jury contend that a prosecutor is not required to submit their entire case to a grand jury, and that a no-bill may be the result of hearing incomplete evidence.²¹ Different grand juries may also have reasonable differences of opinion as to whether an indictment should issue, and allowing resubmission to another grand jury compensates for the fact that there is no appeal from a grand jury issuing a no-bill.²²

¹⁶ *Id.* (quoting *United States v. Dionisio*, 410 U.S. 1, 17-18 (1973)).

¹⁷ The detached relationship between Ohio’s trial courts and the grand jury has been covered in the news following a Cuyahoga County grand jury’s decision to not indict a Cleveland police officer after the death of Tamir Rice. See Cory Shaffer, *Judge plays limited role in grand jury hearings*, THE PLAIN DEALER, Jan. 7, 2016, available at http://www.cleveland.com/metro/index.ssf/2016/01/judge_plays_limited_role_in_gr.html.

¹⁸ *United States v. Mechanik*, 475 U.S. 66, 74 (1986); see also *Williams*, 504 U.S. at 55.

¹⁹ *Williams*, 504 U.S. at 49.

²⁰ Alaska, Arkansas, Colorado, Georgia, Idaho, Indiana, Iowa, Minnesota, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, and South Dakota. BEALE at §8:6, 8-60.

²¹ *Id.* at §8-6, 8-56.

²² *Id.* at §8-6, 8-57.

An obvious advantage to applying double jeopardy protection at the grand jury stage would be that prosecutors' presentations to grand juries would be much more thorough and prepared.²³ Furthermore, by preventing a prosecutor from presenting a case to multiple panels, the grand jury's role as a public shield for the accused is strengthened.²⁴

- **Applying Rules of Evidence**

The majority of jurisdictions that utilize a grand jury do not require that its proceedings follow the rules of evidence.²⁵ There are, however, jurisdictions that apply the rules of evidence to a grand jury proceeding – some with particular exceptions.

California, Michigan, Oklahoma, and South Carolina apply the rules of evidence in total.²⁶ Alaska, Minnesota, and New York apply the rules of evidence but allow hearsay for the sake of convenience, such as authenticating public reports or laboratory test results. Nine other jurisdictions require that all evidence presented to a grand jury be “legal evidence.”²⁷

Not requiring adherence to the rules of evidence would provide for a more efficient presentation to a grand jury. Oftentimes, a single law enforcement agent can provide all the required testimony for an indictment – if left unburdened from the rule against hearsay.²⁸ An argument can be made, however, that the grand jury cannot get an adequate feel for the evidence if they only hear it from a single source.²⁹ Such a plain presentation makes it harder for the grand jury to fulfill its role as a screening body.

- **Internal Procedure**

While Ohio's Constitution, statutes, and rules of criminal procedure provide a very loose framework, most of a grand jury's internal procedures are left to be performed without guidance. Procedural matters such as how a grand jury votes, when it votes, and who determines when a vote is held are not addressed in Ohio law. Presumably, these gaps are plugged by the grand jurors themselves, local prosecutors, or local judges.

²³ Ric Simmons, *Article: Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U.L. REV. 1, 20 (2002) (contending that quick, undetailed presentations would lead to a grand jury becoming a “rubber stamp” for indictments).

²⁴ *Id.*

²⁵ BEALE, at §4:21; Ohio Evid. R. 101(c)(2) specifically precludes the rules of evidence from applying to grand jury proceedings.

²⁶ *Id.*

²⁷ *Id.* While there is no clear case law showing what constitutes “legal evidence,” some statutes tend to be more strongly worded so as to imply only admissible evidence shall be used. Other statutes are more open-ended, seemingly allowing inadmissible evidence.

²⁸ Simmons at 22-23.

²⁹ *Id.*

- **Judicial Review**

While most jurisdictions allow minimal interaction between the court and the grand jury, others allow for more robust oversight over the grand jury's decision. In New York, a criminal defendant can move the court to review the grand jury minutes to determine if there was sufficient evidence presented.³⁰

While advocates for the New York method insist it ensures that the grand jury process is not abused, others contend that too much judicial oversight would encroach on the grand jury's traditional independence.

- **Right to Testify**

Most jurisdictions do not provide an accused criminal defendant with the right to testify before the grand jury. The general theory behind this rule is that the grand jury is an inquisitorial body as opposed to an adjudicatory one.³¹ Some states – such as New York, Nevada, New Mexico, and Indiana – have statutes that provide the accused an opportunity to testify before a grand jury.³²

Instead of passing a statute, other states have viewed the accused's right to testify as a common law right and a necessary element of the grand jury. In West Virginia, the state Supreme Court has ruled that allowing the accused to present evidence allows the grand jury “to fulfill its function of protecting individual citizens and providing them with a forum for bringing complaints within the criminal justice system[.]”³³

- **Model Oath or Charge**

The grand jury's oath and charge likely has the most direct effect on its understanding of its role and responsibilities. While R.C. 2939.06 mandates a specific oath for grand jurors, R.C. 2939.07 only requires an explanation of the law applicable to their duties and that particular attention be given to their “obligation of secrecy.”

While model charges exist for the federal and Ohio grand jury system, they are not mandatory in nature and can be altered by individual courts.³⁴ In theory, different grand juries can be given different instructions – even in the same county – as long as the charge meets the basic requirements set forth in R.C. 2939.07.

³⁰ New York Crim. Proc. Law 210.030; see also Simmons at 26-27 (outlining that some reviews of grand jury transcripts only take minutes).

³¹ BEALE, at §4:19, 4-102.

³² *Id.* at §4:19, 4-106 (New York and Nevada's statutes require that the accused waive their right against self-incrimination and also the civil immunity provided to all grand jury witnesses).

³³ *Id.* at §4:19, 4-104 (quoting *State ex rel. Miller v. Smith*, 285 S.E.2d 500, 504 (W.Va. 1981)) (Other states that have found a common law right to testify before a grand jury include Georgia, Louisiana, Maryland, and New Jersey).

³⁴ *Id.* at §4:5; O.J.I. 301.07.

One example of this can be found in recent testimony before the Ohio Constitutional Modernization Committee. In his testimony, Defiance County Prosecutor Morris Murray quoted portions of a grand jury charge.³⁵ While most of the quoted language loosely tracks the sample language from the Ohio Jury Instructions (“OJI”), there are key differences. The quoted charge warns that “rumor and hearsay testimony are unreliable” and “should be disregarded.” The model charge in OJI does not address hearsay at all.³⁶

Some contend that the charge should have a more robust explanation of the grand jury’s investigative power, independence, and discretion.³⁷ This would better empower the grand jury to fulfill its original role as a voice of the public within the criminal justice system and avoid the appearance that it serves as a “rubber stamp” for the local prosecutor.

- **Secrecy**

Virtually all jurisdictions require a great deal of secrecy from grand jurors. The arguments for enhanced secrecy are largely based around encouraging testimony from those who may otherwise be unwilling, and also preventing an accused criminal from fleeing the jurisdiction. Also, secrecy protects the reputation of the accused should the grand jury decide not to indict.

There are, however, some exceptions utilized in some states that increase grand jury transparency. California makes public the transcripts from any grand jury proceeding that results in an indictment.³⁸ California also permits grand jury proceedings to be completely public if a court finds that subject matter involves “alleged corruption, misfeasance, or malfeasance in office or dereliction of duty of public officials or employees[.]”³⁹

- **A Citizens’ Grand Jury**

While traditionally convened at regular intervals through an arm of the government, a grand jury can be convened under unique circumstances prescribed by law. One such oddity is a grand jury convened by citizens’ petition.

In jurisdictions such as Oklahoma, Nebraska, Nevada, New Mexico, and North Dakota, a group of citizens may gather signatures to form a grand jury and investigate an alleged crime.⁴⁰ Such a mechanism allows a directly democratic approach to investigating crime.

³⁵ Testimony of Morris Murray, Defiance County, Ohio Prosecutor, before the Ohio Constitutional Modernization Commission, Judicial Branch and Administration of Justice Committee, Dec. 10, 2015, *available at* <http://www.ocmc.ohio.gov/ocmc/committees/judbranch>.

³⁶ O.J.I. 301.07.

³⁷ Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS. J. 339, 350 (2010).

³⁸ Cal. Penal Code § 938.1 (Though the court may order the transcripts be sealed per a party’s request or on the court’s own motion).

³⁹ Cal. Penal Code § 939.1.

⁴⁰ BEALE, at §4:2, 4-4.

While Ohio has a similar provision – allowing a citizen with knowledge of a crime to make formal allegations in an affidavit – the statute only requires that the matter be investigated by the local prosecuting authority instead of a grand jury.⁴¹

What an Ohio Grand Jury Should Be – Maintaining the Shield

The grand jury was created to protect citizens from over-zealous prosecution, acting as a shield against unfounded or unfair criminal charges. In more modern times, however, the grand jury has come under fire from scholars asserting that its once protective function is a relic of the past.

Citing near perfect indictment rates, many say the grand jury has become “a total captive of the prosecutor[.]”⁴² This, many argue, shows it has strayed from its initial purpose as a screening entity. Furthermore, strict secrecy requirements limit what amount of review can be given to grand jury proceedings.⁴³ This lack of oversight, some contend, leads to inadequate and unquestioned evidence being used at the grand jury levels.⁴⁴

In response to these critiques, others point out that high indictment rates are a product of only taking worthy cases before a grand jury.⁴⁵ Testifying before Ohio Constitutional Modernization Committee, Butler County Prosecutor Michael Gmoser noted that “any perceived gain from an unfounded indictment is quickly buried by a failed prosecution and the negative publicity that goes with it.”⁴⁶ Also, the concept of secrecy in a grand jury is paramount to the integrity of the body’s investigation. Without secrecy, a chilling effect would hinder a grand jury’s willingness to issue subpoenas and endanger a witness’ candor.⁴⁷

One critique of the traditional grand jury does, however, expose a potential downside of secrecy: losing public confidence in the process. Not knowing what information is presented to a grand jury can lead to speculation – which may or may not be well-founded.

Such questions of public policy aim at the very makeup of Ohio’s grand jury process. Through creation and amendment of statute and rule, the functions of the grand jury can be loosened, tightened, tweaked, and overhauled.⁴⁸ How these changes have been implemented across the country will be more fully explored in “Survey of Other States’ Use of the Grand Jury,” included in this packet.

⁴¹ R.C. 2935.09; see also *In re Charging Affidavit of Demis*, 5th Dist. No. 2013 CA 00098, 2013-Ohio-5520.

⁴² Fairfax at 342, Note 11 (quoting a former federal judge as stating “The grand jury is the total captive of the prosecutor, who, if he is candid, will concede that he can indict anybody, at any time, for almost anything before any grand jury.”).

⁴³ Simmons at 26-27 (citing Fred A. Bernstein, *Note, Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563, 600-03 (1994)).

⁴⁴ *Id.*

⁴⁵ Fairfax at 343.

⁴⁶ Testimony of Michael Gmoser, Butler County, Ohio Prosecutor, before the Ohio Constitutional Modernization Commission, Judicial Branch and Administration of Justice Committee, Dec. 10, 2015, *available at* <http://www.ocmc.ohio.gov/ocmc/committees/judbranch>.

⁴⁷ *Id.*

⁴⁸ One commentator has even argued for shifting the purview of the grand jury to other areas entirely, such as reviewing plea agreements, assisting in drug courts, and reviewing criminal sentences. Fairfax at Part III.



GRAND JURY STATISTICS

When looking to analyze statistics on grand juries, the unfortunate reality is that “grand jury statistics are notoriously difficult to obtain.”¹ There is, however, one largely accepted truth: Grand juries vote to indict at a very high rate.

High Indictment Rates

According to statistics from the U.S. Department of Justice, federal grand juries – through the 1980s and early 1990s – voted to indict in more than 99 percent of cases before them.² Of course, there are many possible reasons for this. Some contend that prosecutors only take cases to the grand jury they know are likely to earn an indictment. Others argue a high indictment rate shows that the grand jury is merely an extension of the prosecutor, unable or unwilling to place a check on the executive branch.

One or both of these explanations may be true, but the reality is that there is insufficient evidence to really be certain. Grand juries operate largely outside of the public eye, leaving the world unable to investigate whether they are properly performing their function as a screening entity.

High Conviction Rates

One statistic tending to show that prosecutors mainly pursue strong cases is conviction rate. In 2014, federal prosecutors secured 74,392 guilty verdicts, 312 not guilty verdicts, and 5,470 cases were dismissed or disposed of in some fashion.³ Of those 80,174 cases resolved in 2014, around 92 percent resulted in a conviction. In studies of previous years, it is generally expected that about 90 percent of all convictions are the result of a guilty plea.⁴

High Plea Bargain Rates

While those numbers clearly show that most indictments are validated by a guilty verdict, some have contended that the high number of guilty pleas actually shows the downside of a high indictment rate.⁵ Such a theory posits that prosecutors seek indictments for a more serious charge

¹ Ric Simmons, *Article: Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U.L. REV. 1, Note 133 (2002).

² Statistical Reports from Executive Office for U.S. Attorneys for years 1985 to 1991, *available at* <http://www.justice.gov/usao/resources/annual-statistical-reports>. (In 1992, these annual reports stopped including numbers of times a grand jury declined to indict an accused. Also, every single annual report lists an indictment rate of more than 99 percent.)

³ Statistical Reports from Executive Office for U.S. Attorneys for 2014, *available at* <http://www.justice.gov/usao/resources/annual-statistical-reports>. Similar conviction rates are found in previous years.

⁴ Federal Justice Statistics 2011-2012, Pg. 19-20, *available at* <http://www.bjs.gov/content/pub/pdf/fjs1112.pdf>.

⁵ Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 563, 505-06 (1980).

when the evidence is marginal, then secure a plea bargain for a lesser charge. In such a scenario, the indictment is less of a threshold for suspicion and more of a bargaining chip.

In Ohio, there are no real statistics as to conviction rate. The statistics in Ohio do suggest a high plea bargain rate. In 2014, Ohio Courts of Common Pleas terminated 64,022 criminal cases by way of a trial, plea, diversion program, or dismissal.⁶ Of those cases, just shy of 80 percent were disposed of by way of a plea, about 10 percent were dismissed, and about seven percent utilized a diversion program. Less than three percent went to trial.⁷

Just under 45 percent of all 2014 criminal cases ended with a plea to a *lesser* charge than the one listed in the indictment.⁸ Similar rates for both are found in 2013 and 2012.⁹ In more populace areas, the number of pleas to lesser charges appears to be even larger. In 2014, 67 percent of cases in Cuyahoga County Court of Common Pleas ended through pleading to a lesser charge. In Franklin County that number is 64 percent, and in Hamilton County it is 58 percent.

⁶ 2014 Ohio Courts Statistical Report, Supreme Court of Ohio, pg. 77-78, *available at* <http://www.supremecourt.ohio.gov/Publications/annrep/14OCSR/2014OCSR.pdf>. (14,773 criminal cases were transferred to another judge or court, or stayed because of the party being unavailable or going through a bankruptcy. Those cases are not included in this statistic.)

⁷ *Id.* 51,046 cases ended in a plea, 6,808 were dismissed, 4,619 utilized a diversion program, and 1,549 went to trial.

⁸ *Id.* 28,330 cases pleaded to a lesser charge.

⁹ Ohio Courts Statistical Reports, *available at* <http://www.supremecourt.ohio.gov/Publications/default.asp>.

SURVEY OF OTHER STATES' USE OF THE GRAND JURY

While the right to a grand jury is entrenched in America's history and mandated in its constitution, the Federal judiciary has not held that it is required at the state level.¹ Individual states are free to adopt the traditional grand jury, modify it, or abandon it completely. To that end, states have fulfilled their role as "laboratories of democracy" by experimenting with different variations on the grand jury.²

Whether to Require an Indictment

While almost every state gives law enforcement the option to use a grand jury, not every state *requires* it do so.³ In 27 states, the prosecution has the option of filing a criminal complaint or seeking a grand jury indictment.⁴ A list of these states can be found below:

- | | | |
|--------------|----------------|-----------------------------|
| - Arizona | - Maryland | - Pennsylvania ⁵ |
| - Arkansas | - Michigan | - South Dakota |
| - California | - Missouri | - Utah |
| - Colorado | - Montana | - Vermont |
| - Hawaii | - Nebraska | - Washington |
| - Idaho | - Nevada | - Wisconsin |
| - Illinois | - New Mexico | - Wyoming |
| - Indiana | - North Dakota | |
| - Iowa | - Oklahoma | |
| - Kansas | - Oregon | |

These 27 states generally maintain alternative, dual systems for bringing felony charges: (1). The traditional grand jury process; and, (2) Prosecutors filing charges by information or presentment.

¹ *Hurtado v. California*, 110 U.S. 516 (1884).

² *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (elaborating on the importance of individual states being able to try "novel social and economic experiments[.]")

³ In Connecticut, there is no grand jury system used to indict accused defendants. There is a grand jury system available to prosecutors to investigate crimes and issue a report as to whether they believe a crime has been committed, but the ultimate decision to file the case lies with the prosecutor.

⁴ Nine of these states have a constitution that requires the use of a grand jury, but allows the state legislature to abolish or modify its use. All nine of those states have enacted statutes that allow for prosecution by filing a complaint. The nine states are Colorado, Illinois, Indiana, Iowa, Nebraska, North Dakota, South Dakota, Utah, and Wyoming.

⁵ The Pennsylvania Constitution requires the use of a grand jury, but allows individual counties to create a system of prosecution by information. Every county in the state has created such a system. 1 BEALE, SARA, ET AL., GRAND JURY LAW & PRACTICE, § 1:7, 1-32 (2d ed. 2002)

In contrast, 22 states still mandate the use of a grand jury for felony level crimes:⁶

- Alabama
- Alaska
- Delaware
- Florida
- Georgia
- Kentucky
- Louisiana
- Maine
- Massachusetts
- Minnesota
- Mississippi
- New Hampshire
- New Jersey
- New York
- North Carolina
- Ohio
- Rhode Island
- South Carolina
- Tennessee
- Texas
- Virginia
- West Virginia

Whether a grand jury indictment is required is often determined by a state's constitution, and in particular cases the state's Bill of Rights. States that allow alternative charging systems generally require the legislature to define which system will be used in which circumstances. In contrast, states where the constitution mandates the use of the grand jury have no alternative available. The Ohio Bill of Rights, for example, directly prescribes the process by which prosecutors must seek felony charges.

Size of the Grand Jury, Votes Needed for Indictment, Length of Term

Of the 22 states that provide a right to a grand jury, most require the jury to have approximately 12 to 18 members.⁷ The number of grand jurors needed can be as few as 5 or as many as 23.⁸ Other states, such as California and Delaware, require different numbers of jurors depending on the size of the particular county. Ohio grand juries must consist of at least 9 members.⁹

Regardless of how many jurors ultimately comprise a grand jury, a supermajority is typically required to issue an indictment. Most states require votes of approximately three-quarters of their grand jurors for an indictment.¹⁰ This varies to some extent in states that allow for different sized grand juries. For instance, in Maine a grand jury can consist of 13 to 23 jurors – but an indictment *always* requires 12 votes. For a Maine grand jury made up of 13 jurors, 12 of their

⁶ Florida, Louisiana, Minnesota, and Rhode Island only require an indictment in a capital case. *Id.*

⁷ There is a wide variance between states as to how many grand jurors are required, but most fall within the range of 12 to 18. State Court Organization Tables, National Center for State Courts, Table No. 47, available at <http://www.ncsc.org/microsites/sco/home/List-Of-Tables.aspx>.

⁸ *Id.* Virginia requires its grand juries consist of five to seven members. States such New York, Georgia, and Minnesota allow their grand juries to have up to 23 members.

⁹ R.C. 2939.02 requires a grand jury to consist of 15 members, but the Supreme Court of Ohio has ruled that the conflicting requirement set forth in Ohio Crim. R. 6 controls, meaning only 9 are required. *State v. Brown*, 38 Ohio St.3d 305, 528 N.E.2d 523 (1988).

¹⁰ State Court Organization Tables, *supra* note 5.

votes would be needed to issue an indictment. Similar situations can be found in New Hampshire, North Carolina, and Mississippi. In Ohio, 7 votes are needed for an indictment.¹¹

States also vary as to how long a grand jury must serve. The length of a grand jury's term can range from 30 days to two years.¹² The typical term, however, is between 6 and 18 months. In Ohio, a grand jury's term lasts 4 months.

Appointment of Special Prosecutor

In light of several high profile cases where the use of grand juries has led to criticism, a number of states have introduced legislation to reform their grand jury processes.¹³ One proposed reform is the use of a special prosecutor in cases where a police officer is implicated in a fatality. Proponents of the special prosecutor system contend that it alleviates the appearance of impropriety in cases where the "symbiotic relationship" between prosecutors and law enforcement "creates public suspicion."¹⁴

New York State recently instituted such a reform by way of executive order.¹⁵ The executive order, signed on July 8, 2015 requires that the state attorney general serve as special prosecutor in any case where an officer kills an "unarmed" civilian or where "there is significant question as to whether the civilian was armed and dangerous at the time of his or her death."¹⁶ South Carolina has also implemented new procedures that require an open hearing on a motion to recuse a state attorney general from grand jury proceedings.¹⁷ Special Prosecutor bills have also been introduced in the state legislatures of California, Connecticut, Georgia, Iowa, and Maryland but have not made it further than committee hearings.¹⁸ California has taken the step of removing officer related shootings from the grand jury process altogether.¹⁹

Ohio has a generalized statute allowing for the appointment of special prosecutors, but leaves it to the discretion of the presiding court and does not specifically set forth a procedure for doing so in a grand jury investigation.²⁰ Missouri has a statute similar to Ohio's, leading many to

¹¹ R.C. 2939.20 requires 12 votes for an indictment, but the Supreme Court of Ohio has ruled that the conflicting requirement set forth in Ohio Crim. R. 6 controls, meaning only 7 votes are required. *State v. Brown*, 38 Ohio St.3d 305, 528 N.E.2d 523 (1988).

¹² State Court Organization Tables, *supra* note 5. A grand jury's term in New Hampshire is 30 days, while Tennessee and South Carolina have 2 year terms.

¹³ Steven M. Witzel, *Grand Jury Reform One Year After Ferguson and Staten Island*, NEW YORK LAW JOURNAL, Sept. 10, 2015, available at <http://www.newyorklawjournal.com/id=1202736713658/Grand-Jury-Reform-One-Year-After-Ferguson-and-Staten-Island?mcode=0&curindex=0&curpage=ALL>.

¹⁴ *Id.*

¹⁵ New York Exec. Order 147, available at <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO147.pdf>.

¹⁶ *Id.*

¹⁷ S.C. Code Ann. §14-7-1650.

¹⁸ Witzel, *supra* note 13; California AB-86, available at http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201520160AB86.

¹⁹ Cal. Penal Code 917(a).

²⁰ R.C. 2941.63.

advocate for a special prosecutor in the case of Michael Brown.²¹ In Washington, the grand jury itself has the authority to petition for a special prosecutor.²²

Expanded Guidance as to Independent Investigatory Powers

Grand juries have historically been vested with broad investigatory powers, though it is an open question as to whether jurors are aware of the extent of this power.²³ Without a presiding judicial officer, functionality requires the prosecutor serve a key role in the basic operation and organization of the grand jury. With the goal of emphasizing the grand jury's independence, a small minority of states have limited the prosecutor's role in the grand jury investigation²⁴ and others have taken steps to include the presiding court.²⁵

Some states have taken steps to encourage a grand jury to launch its own investigation. In Virginia, grand juries are divided into two separate categories: Regular and Special.²⁶ A regular grand jury performs the traditional function of voting whether to issue indictments. A special grand jury is given enhanced investigatory authority. Also, a special grand jury can be convened at the order of the court, request of the prosecutor, or at the request of the grand jurors themselves.

In fact, the presiding court is *required* to ask the regular grand jury – upon completion of its duties – whether it desires to convene as a special grand jury to “investigate and report on any condition that involves or tends to promote criminal activity, either in the community or by any governmental authority, agency or official thereof.”²⁷ Once convened, the prosecutor may only be present before the special grand jury at its request, and special counsel may be appointed to advise the grand jury.²⁸ The Special Grand jury may then vote as to whether an indictment may issue from its findings.

What Do Grand Juries Hear – And From Whom?

As set forth above, prosecutors are largely responsible for presenting evidence to the grand jury and, traditionally, are not required to present exculpatory evidence. About a quarter of all states – through statute or case law – address whether exculpatory evidence must be presented to the grand jury.²⁹ Of those states, the duty placed upon prosecutors ranges from only strongly

²¹ Associated Press, *Background of prosecutor in Ferguson case has some questioning probe's credibility*, CBS NEWS, August 18, 2014, available at <http://www.cbsnews.com/news/background-of-prosecutor-in-ferguson-case-has-some-suspicious-of-bias/>.

²² Wash. Rev. Code Ann. § 10.27.070(10).

²³ See generally, Andrew D. Leipold, *Article: Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995).

²⁴ BEALE, §4:15, 4-66. A prosecutor's presence in grand jury proceedings is severely limited in Connecticut, North Carolina, and South Carolina.

²⁵ *Id.* at §4:15, 4-71. Many states have clarified, through statute, that both a prosecutor *and* the court may provide basic legal advice to the grand jury.

²⁶ Va. Code §19.2, Ch. 13, et seq.

²⁷ Va. Code §19.2-191(2).

²⁸ Va. Code §19.2-210; §19.2-211.

²⁹ BEALE, §4:17, 4-84 to 85.

suggesting the disclosure of *exonerating* evidence³⁰ to requiring disclosure of any evidence that would be *exculpatory*.³¹

While it is often the case that a prosecutor has no duty to present exculpatory evidence, it is a different question as to whether the grand jury may demand it itself. Generally speaking, a grand jury has broad power to subpoena any evidence it desires. Some states, however, have statutes that tell a grand jury how it must handle exculpatory evidence.³² Twelve states grant the grand jury the *discretion* to demand the exculpatory evidence,³³ while five other states *require* that a grand jury demand exculpatory evidence when it knows of its existence.³⁴

If evidence is not presented by the prosecutor or demanded by the grand jury, it may be provided by the accused themselves. The overwhelming majority of states do not give the accused a right to testify or present evidence.³⁵ At least three states do allow an accused to request the prosecutor for an opportunity to testify, and if their initial request is denied they may appeal to the presiding judge.³⁶ Tennessee allows the accused to make this request directly to the grand jurors.³⁷ Other states, such as Indiana, Nevada, New Mexico and New York, allow an accused to testify under certain conditions.³⁸

³⁰ *Id.* Alaska, Arizona, Connecticut, Hawaii, Idaho, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, and Oregon. Ohio is included on this list based on case law, but the cited case is a malicious prosecution lawsuit which only states in dicta that exonerating evidence *should* be given to the grand jury in the interest of justice. *Mayer v. City of Columbus*, 10th Dist. No. 94APE09-1316, 105 Ohio App.3d 728, 740 (1995).

³¹ Cal. Penal Code § 939.71.

³² BEALE, §4:18, 4-97.

³³ Arizona, Arkansas, Idaho, Iowa, Kentucky, Louisiana, New Mexico, New York, Utah, Oklahoma, Oregon, and South Dakota.

³⁴ Alaska, California, Nevada, North Dakota, and Montana.

³⁵ BEALE, §4:19, 4-100. Of course, the prosecutor always has the option to present the accused's testimony.

³⁶ BEALE, §4:19, 4-104 to 105. Colorado, Nebraska, and North Carolina.

³⁷ Tenn. Code §40-12-104

³⁸ BEALE, §4:19, 4-106. A common requirement is that the accused waive their right against self-incrimination.



NOTES

NOTES



THE SUPREME COURT *of* OHIO

65 South Front Street
Columbus, Ohio 43215-3431